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Humanities and the Law: A Kinship of Performance

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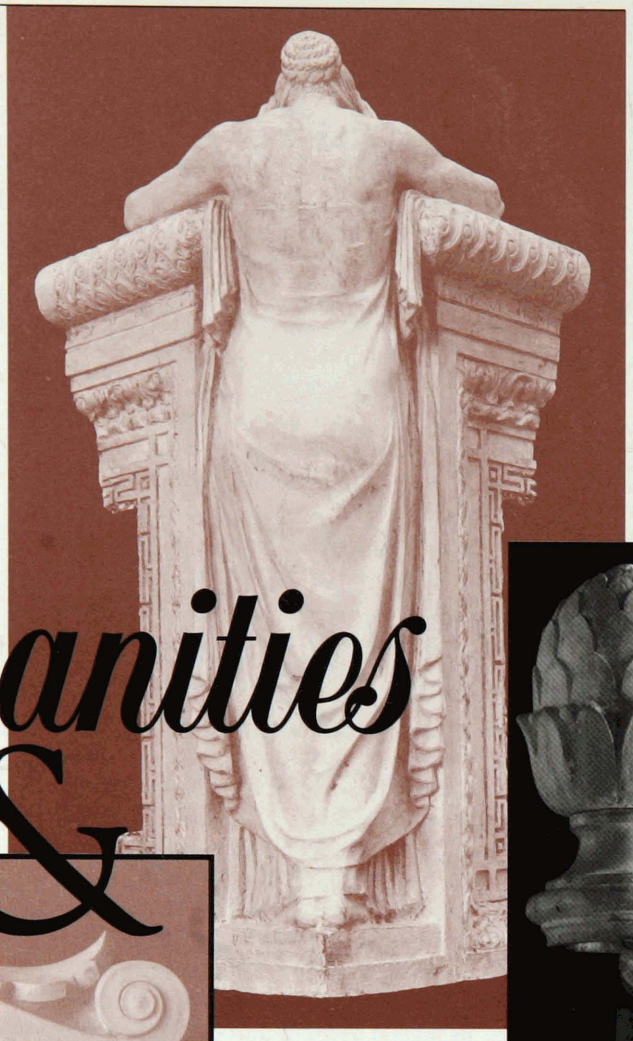
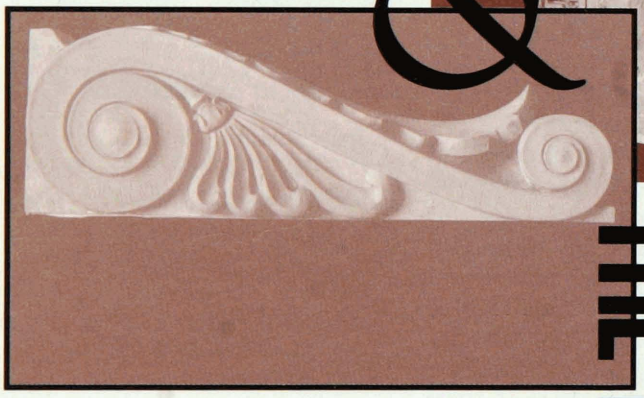


Humanities & THE LAW



A KINSHIP OF PERFORMANCE

The following essay is adapted from "A Visiting Scholar Considers The Law and the Humanities," which appeared in The Key Reporter *of* Phi Beta Kappa *in summer 1998 as a partial report of the author's year as a* Phi Beta Kappa *Visiting Scholar. The selection here is a summary of a lecture the author delivered during his travels to eight colleges and universities throughout the United States. A more complete version will appear in* From Expectation to Experience: Essays on Law and Legal Education, *a collection of the author's essays being published this year by the University of Michigan Press.*

— BY JAMES BOYD WHITE

Let us begin by considering three fragments of works that would be the object of study in the humanities: a piece of Emily Dickinson's famous poem, "Because I could not stop for Death"; the pair of scales in the well-known painting by Vermeer at the National Gallery in Washington, D.C., in which a woman stands at a table on which gold coins are scattered, holding those scales pensively in her hand; and the location of the door in the chapel at Ronchamp by Le Corbusier,

which is atypically on the south side of the church rather than at the west end. With these I compare a quotation from *Brown v. Board of Education*. The question is: What connections can be drawn among these various items, or between what we do when we study and respond to the first set of items and what we do when we study and respond to the last?

Let us start with the first set, trying to work out what it is that humanists typically do; then we can turn to the activities of the law, which at first seem utterly different but which in the end reveal surprising similarities.

The first and most important characteristic of humanistic work is that it focuses on a text or other artifact made by others, in other cultural circumstances, and usually in the past. The distinctive concern of the humanist is with the meaning of the artifact we examine — that is, its *meaning* to the maker and the original audience, and its meaning to the present viewer and the audience today.

Because each of the items with which we begin is a fragment of something larger, the first task is to define the "whole" of which the item is a part — the whole poem, or painting, or church. But this approach leads us to other wholes — the whole *oeuvre* of the maker, or the whole world of poems or paintings or churches that defined the expectations of the maker and the original audience, indeed the whole cultural context against which it is a performance.

Thus, to understand Vermeer we need to understand something of the school of Dutch painters who preceded him and began to represent, as he did, the informal interiors of bourgeois homes and the ordinary lives of the people who lived there, including the women.

To understand Dickinson, we need to understand something of the sentimentalizing conventions governing 19th century American verse, especially women's verse, for only then will we see her resisting some, using others, to make a verse that is extraordinarily her own. In the poem I use, for example, the comfortable way "Death" is represented at the beginning, as a kindly gentleman neutralized by his companion "Immortality," is consistent with the tendencies of her day, but the poem reverses these, and ends with great bleakness, converting "Immortality," with all of its promise of heaven, into "Eternity," something very different indeed.

She begins:

Because I could not stop for Death —
He kindly stopped for me —
The Carriage held but just Ourselves —
And Immortality.

But she turns the tables by concluding:

Since then — 'tis Centuries — and yet
Feels shorter than the Day
I first surmised the Horses' Heads
Were toward Eternity —

Much the same is true of Le Corbusier, for his church, which seems so odd at first, like nothing one has ever seen — on the outside like a sculpted haystack, on the inside dark and disorienting — turns out, as we work our way into it, to have the same basic architectural form as other churches. Initial strangeness proves familiar and illuminating. But neither part of the experience, neither the strangeness nor the familiarity, would be available to one who did not know what to expect of the design of the church in this culture.

Humanistic study thus involves attunement to the culture and context against which the work in question is a performance. Like travel to a different country, the experience of this attunement changes our own imagination, and we return to our own world with different eyes. It is, in fact, part of the point of such work to expose and thus subject to the possibility of criticism some of our own unconscious presuppositions and attitudes.

The meaning of a work of the kind we are discussing is thus fundamentally experiential in kind: the surprise into familiarity that Le Corbusier's church at Ronchamp offers, for example, or the despair enacted in the shift from "Immortality" to "Eternity," or the frustration of asking questions about the Vermeer painting that it will never answer. The experience is never complete; it is not the same for everyone; and to work our way into it is an activity that changes our own mind and imagination.

To summarize, then, we can say that the work of the humanities is about artifacts and texts from other cultures and times; that it is about their meaning, as fully understood as possible; that this meaning requires an understanding of the context against which the original work is a performance; that this meaning cannot be fully restated, both because of the gap between one culture and another and because of the gap between different parts of the self.

What connection can there be between this set of activities and the law?

It may seem at first none at all: The law is, after all, the bureaucratic arm of a bureaucratic state; it is about consequences or results in the real world, not about texts or language or the world of the imagination; it is about power, not beauty or truth. It is very often seen as a branch of public policy, in which legal questions are collapsed into questions of social science or political preference. More familiarly, perhaps, law is often seen simply as a set of rules, to be obeyed or disobeyed. Of course, the law can be imagined, sometimes usefully, in each of these ways, especially when viewed from the outside. But when it is viewed from the inside, by someone who lives on its terms, it can be seen as a field of life and practice, as a set of intellectual and imaginative activities, and, as such, far closer to the humanities than we normally imagine.

To take one crucial aspect of their work, lawyers, like humanists, are constantly concerned with the understanding and interpretation of texts that are made by others, in other cultural circumstances, and usually in the past; and the lawyers' interest is always in what these texts mean, or should be said to mean. Consider, for example, the passage from *Brown v. Board of Education*, to which I alluded earlier:

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reasons of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Like the examples given earlier, this is a fragment of a larger text, and the lawyer's first task is to locate it in the larger whole of which it is a part. In this case, the meaning of the phrase "in the field of education" raises serious questions: Does the Court mean to limit its holding to public education, permitting segregation in restrooms, parks, and swimming pools, for example? Or is the educational aspect of this case really an accident? Or is there some other explanation for this language? Such questions will carry us both to the rest of the opinion and beyond it, to its larger context.

In law as in the humanities, the relevant "whole" thus expands to include not

merely the single work of which a passage is a part, but the range of contexts against which it is a performance, here including earlier cases relied on as authority for segregation by race, like the infamous *Plessy v. Ferguson*; cases that cut the other way, like *Sweatt v. Painter,* which insisted that "equality" meant full educational equality and not simply equal equipment or facilities; the language of the Fourteenth Amendment itself; the debates about its adoption; the history giving rise to it; and contemporaneous debates in the public arena about states' rights and about the evils of segregation.

Like the poem, the church, and the painting, the opinion can only be read as a response to its preexisting world, against which it is a performance. This means, in turn, that the meaning of the opinion is, despite appearances, not essentially propositional but experiential in kind: It is performance against a background, and understanding the opinion requires attunement to that background.

The difficulties of reading a case in its original context are greatly increased when we try to translate the meaning we are beginning to understand into the present, and thus into a world different not only from that of the case itself, but from any that was then imagined. What does *Brown* mean today? The promise it held out, of an integrated society within a single generation, and an end to racial hatred and contempt, can now be seen as a hollow one. Of course, many African American students do go to integrated schools, and to integrated colleges, but it cannot be denied that a great many schools are effectively segregated, not in the first instance by law but by residential patterns. Furthermore, there are those who want schools that will focus upon African American culture, seeking to instill pride and discipline — a kind of proposed self-segregation on the grounds of better education — which complicates the basic premise of *Brown*, that integration is an inherently good thing.

The question of present meaning that probably has the most bite at the moment is that of affirmative action: Is the promise of *Brown* fulfilled merely by forbidding the state to segregate by law, or does it require — or at least permit — affirmative state action to end the patterns of racial

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dominance and abuse that have characterized American society nearly from the beginning? Or does *Brown's* hostility toward racial segregation support the view that the state should be prohibited from drawing racial lines, even those that benefit the minority? These are questions *Brown* raises but does not answer; in finding or making answers to them, the law will seek simultaneously to be true to *Brown* and, of necessity, to give it new meaning in a new world.

When we look back to *Brown* and ask what it means for the present, it is not enough, then, for us to try to understand this gesture in the context in which it occurred; we must translate it from one world to another world, and, in translating, change its meaning.

To generalize quickly from this all too brief summary, it is evident that, like the humanities, the law takes as its subject texts or artifacts made by others, in other cultural circumstances, and in some way in the past; that the law is concerned with their meaning, in the first instance to the lawmakers and the world they addressed, in the second instance to "us," that is, the present world; that this meaning is fundamentally performative and experiential in kind, inhering in a performance against a context; that this meaning cannot be reflected without distortion in our world and language; that its meaning to "us" is therefore a translation that entails a transformation, carried on under simultaneous and opposed fidelities to the original and to the world into which it is carried. The reading of texts in the law is thus an art in many ways like the art of reading humanistic texts.

Of course, there is more to say on this subject, for the law has its own constraints and its own significances. But the most notable distinction — the fact that it is an exercise of official power — does not much affect what I say, except to make it even more important that the process of thought and imagination by which legal texts are read be sensible, wise, and good. The main point remains, which is that in both the law and the humanities we are struggling with problems of meaning, of cultural difference, of the authority of different languages. One of my deepest beliefs is that to read the work of a mind engaged with one form of this struggle may help us to understand a mind engaged in another, and help us confront our own languages, uncertainties, and translations as well. As lawyers, we have much to learn from the efforts of others in other forms; and perhaps it works the other way, too — that is, painters, poets, and architects have something to learn from their sister discipline, the law.

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